No. 85-1722

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI ON BEHALF OF PENNSYLVANIA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, VIRGINIA, WYOMING AND the DISTRICT OF COLUMBIA,

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Interest of The Amici

The amici states and the District of Columbia each operate extensive prison systems. The need for order and security within these institutions requires that amici prescribe general rules governing such matters as movement within the prisons, visitation rights, grooming standards and the types of personal property which prisoners may possess in their cells. Inevitably, these general rules come in conflict with individual prisoners' religious practices. Some religions may require that particular observances, sometimes in groups, be held on particular days or at a specific time of day. Certain religions employ specific tangible symbols or substances. There are religions which prescribe the adherents' dress or hair length.

Amici are faced on a daily basis with requests by prisoners that general prison rules governing security or order within the institution be modified, on an individual or group basis, to permit prisoners fully to exercise their religions. Amici all make a genuine effort to accommodate the practice by prisoners of their religions with the primary institutional goals of safety and security. In some instances, the prison administrators conclude that accommodation would jeopardize essential institutional goals.

This case presents the Court with the opportunity to clarify the standard which the courts should apply in assessing a claim that prison administrators have violated the Constitution by deciding not to waive an institutional rule which prevents a prisoner from fully exercising his

religion. The rule endorsed by the Court of Appeals in this case creates serious problems for amici in the administration of their prison systems because it requires the federal courts to substitute their own judgment for that of prison administrators in determining whether an individual prisoner's requested accommodation is consistent with institutional concerns for safety and security. By thus enmeshing the courts in the day-to-day operations of correctional facilities, the Court of Appeals has seriously interfered with the exercise of professional judgment by these expert administrators.

In prior cases, this Court has sought to balance the constitutional rights of prisoners against the need to maintain order and security within the

prisons. There has evolved a standard which affords substantial deference to the decisions of prison officials. The Court of Appeals has upset seriously this balance in a manner which prevents prison administrators employed by amici from properly operating their institutions.

Reasons For Granting The Writ

This case presents the Court with the opportunity to determine the appropriate standard of review for prison regulations which curtail free exercise of religion. As petitioners describe, the courts of appeals have adopted various inconsistent approaches for resolving the tension between prison rules and inmates' religious practices. The standard adopted by the Third Circuit in this case departs not only from those endorsed by other courts of appeals, but also from the rules followed by this Court in resolving First Amendment challenges to prison policies. For these reasons, this Court's review is warranted.

1.a. It is well-established that, although a prisoner does not lose all constitutional protections by virtue

of his incarceration, the conviction itself and the legitimate policies of the institution sanction restrictions on constitutional rights. Bell v. Wolfish, 441 U.S. 520, 545-546 (1979). Institutional security, order and discipline are among the primary goals which justify restrictions on inmates' constitutional rights. Id. at 546-547.

Recognizing that the operation of corrections facilities is an extraordinarily difficult task with which "courts are ill equipped to deal," id. at 547 n.29, the Court repeatedly has deferred to the expert judgment of prison administrators that particular restrictions are necessary to preserve institutional security. See Block v. Rutherford, No. 83-317 (July 3, 1984); Bell v. Wolfish, supra; Jones v. North

Carolina Prisoners' Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974).

A facially reasonable expert judgment that certain restrictions are necessary will be upheld, unless there is "substantial evidence in the record that the officials have exaggerated their response" to security considerations. Pell v. Procunier, supra, 417 U.S. at 827, quoted with approval in Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 128. Of course, the Court applied this test in Pell and Jones, both of which involved, like this case, restrictions on First Amendment rights.

b. Although the Court of Appeals acknowledged these principles to a degree, its decision departs from this Court's decisions in several important

respects. The Court of Appeals held that in each case the courts must determine whether there exist methods, other than those chosen by prison officials, which permit inmates to exercise their religion "without creating bona fide security problems." Pet. App. 9A (footnote omitted). The Court of Appeals apparently is requiring that prison regulations impose on inmates' free exercise rights the fewest restrictions which are consistent with institutional security. But this Court repeatedly has rejected a least restrictive alternative analysis in this area. See Block v. Rutherford, supra, slip op. at 13-14 n.10, 15 n.11; Bell Wolfish, supra, 441 U.S. at 542 n.25.

While the Court of Appeals' approach may be facially appealing, what it ignores is that the deference principle has been followed by this Court

precisely because the courts are in no position to appreciate fully the myriad considerations which must be weighed by prison officials when adopting security policies. The experts must be given a wide berth to implement those policies in the best way they know how. The Court of Appeals, by contrast, now has placed the federal courts squarely astride the day-to-day operations of state prisons to oversee whether prison policies are affording the widest latitude possible for religious observance. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation...." Illinois Elections' Board v. Socialist Workers Party, 440 U.S. 178, 188 (1979)(Balckmun, J., concurring).

Of course, the real risk created by the Court of Appeals' decision is that prison administrators, knowing that their choice among several available security measures may be scrutinized by a federal court, always will choose the least restrictive measure. The potential for a damages award, or at least costly litigation, will prove to be a powerful straight-jacket on the exercise of professional judgment. In the past, the Court has been careful to craft standards for reviewing professional judgment which avoid second-guessing by the courts. See Youngberg v. Romeo, 457 U.S. 307, 321-323 (1982); Parham v. J.R., 442 U.S. 584, 608 n.16 (1979). The decision of the Court of Appeals in this case represents a serious departure from these principles thus justifying this Court's review.

c. The Court of Appeals apparently was influenced in its resolution of the case by the fact that religious rights are at issue. But the nature of the underlying right calls for no different mode of analysis.

There is "no principled basis on which to create a hierarchy of constitutional values." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982). In fact, this Court has applied the deferential test in cases raising First Amendment challenges to prison regulations. Jones v. North Carolina Prisoners' Union, supra; Pell v. Procunier, supra. The Court of Appeals offered no justification for distinguishing among First Amendment rights when judging prison regulations. This remarkable result justifies this Court's review.

d. Finally, the Court of Appeals required that security concerns be "genuine" and "based on more than speculation." Pet. App. 9A. The Court also took pains to observe that no security problems had arisen before the prison policies at issue in this case were made more restrictive. Pet. App. 11A. This line of reasoning represents a dangerous incursion into the ability of prison officials to prevent breaches of security.

In holding as it did, the Court of Appeals ignored this Court's direction that prison officials must be permitted to "forestall" threats to security before problems occur. Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 132-133. See also Bell v. Wolfish, supra, 441 U.S. at 551 n.32. Indeed, even outside the prison context the Court has recognized that

the potential for disruption may justify official actions which have an impact on First Amendment rights. See Connick v. Myers, 461 U.S. 138, 152 (1983). The idea that an inquiry into past security problems is even relevant seriously erodes the ability of prison administrators to anticipate problems and implement far-reaching, new security measures in advance of a serious breach of security.

For these reasons, review by this Court is appropriate.

2. The conflict among the circuits, which the decision below at least exacerbates, is an additional ground justifying the Court's review. Petitioners have described at length the varying, inconsistent approaches taken by the courts of appeals. Pet. 9-11.

We will not repeat that discussion here. One point, however, bears emphasis.

In reaching its decision here, the Third Circuit now has rejected the standard which it adopted in St. Claire v. Cuyler, 643 F.2d 109 (3d Cir. 1980). But two other courts of appeals have explicitly adopted the analysis in St. Claire. See Hill v. Blackwell, 774 F.2d 338, 342 (8th Cir. 1985); Brown v. Johnson, 743 F.2d 408, 412-413 (6th Cir. 1984), cert. denied, No. 84-1029 (February 19, 1985). This circumstance illustrates that the conflict among the circuits is both direct and irreconcilable.

The Court should accept this case for review to resolve the conflict among the Courts of Appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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